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In The

Supreme Court of the United States

No. 1054.

HOWELL VAN AUKEN, Administrator with Will Annexed of the Estate of Lila Eddy Doebler, Deceased, and CYNTHIA MILLS CLEVELAND,
Petitioners and Appellants Below,

v.

SECOND NATIONAL BANK AND TRUST COMPANY of Saginaw, Michigan, as Trustee, etc.,
Respondent and Appellee Below,
C. K. EDDY AND SONS, a Corporation, CHARLOTTE D. MORGAN, R. PERRY SHORTS, GEORGE B. MORLEY and his Executors, and MERCANTILE TRUST COMPANY of Baltimore, Maryland,
Respondents and Appellees Below.

(No. 8366.)

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The opinion of the District Court is found at pages 168 to 185, inclusive, of the record, and the final judgment, pages 186 to 188, inclusive.

The final judgment of the District Court in all particulars was affirmed by a *Per Curiam* opinion by the Circuit Court of Appeals, Sixth Circuit (Hicks, Allen and Martin, circuit judges) found in *117 Federal (2nd Series) 1009.*

Motion for rehearing was denied March 14, 1941.

JURISDICTION.

Appellate jurisdiction is based upon Section 240 (amended) of the Judicial Code.

The respondents know of no special and important reasons why a review on writ of certiorari should be granted, as the case is of interest only to the parties involved and is controlled by a question of fact and an accounting.

STATEMENT OF THE CASE.

Mr. Arthur D. Eddy, of the city of Saginaw, Michigan, now deceased, in the ninth paragraph of his will left one-third of the stock of C. K. Eddy & Sons in trust for the life of Lila Eddy Doebler, his sister, and upon her death one-half of the trust, including accumulated income, to her daughter, his niece, Cynthia Mills Cleveland, i. e., one-sixth of the capital stock of C. K. Eddy & Sons.

Counsel for counter-claimants (petitioners) claim that the assets had been depleted, the corporation mismanaged, and that the trustee was liable for the losses suffered.

The District Court, in 1936, made an interlocutory order directing an accounting of the corporate assets, took testimony, and found as a fact that the corporation was not being used for any ulterior purpose and that there was no fraud and no mismanagement in its affairs. He then vacated his interlocutory order, after having looked through the corporate entity, and directed the trustee to continue operating in the corporate manner, having determined that the value of the shares had been maintained.

PETITIONERS' POSITION.

Opposing counsel states his client's position very clearly on page 784 of the record, as follows:

> * * * "the rule as we contend in this case is that Mrs. Cleveland is entitled to a full one-sixth of the fair value, not less than $4,211,000 of the gross estate of Mr. Arthur Eddy at his death, less the administration expenses of $500,000, or a total of not less than $616,000 net, as the value of Mrs. Cleveland's one-sixth plus her proportion of all gains actually made or which should have been made in a ready market available to the trustee within a reasonable time after Mr. Arthur Eddy's death. * * *
>
> * * * For example, to the one-sixth of the net fair value of the estate in April, 1925, should be added one-sixth of the $38,250 realized in February, 1926, by the sale of the D. D. D. stock over and above the asset appraisal. There is no reason why such a gain should be reduced on an accounting by, for example, the dealing in New York Central Railroad stocks resulting in a total loss of $43,000."

RESPONDENTS' POSITION.

It is respondents' position that it was the duty of the trustees to use due care in holding said certificates, in the voting of the stock, in the control of the corporation, and to use due diligence in maintaining the assets behind the stock, but that they were not guarantors of the value of the trust assets or property, and especially not the guarantor of the value of C. K. Eddy & Sons, nor its assets.

STATEMENT OF FACTS.

(Figures in parentheses refer to pages of the printed record in Case No. 8366, in the Circuit Court of Appeals, except as the context clearly indicates otherwise.)

This application for writ of certiorari is taken from the judgment of the Circuit Court of Appeals affirming the District Court's judgment disposing of all of the issues raised in the case, a separate appeal having been taken from the judgment of the court dismissing the counter-claims against C. K. Eddy & Sons et al., arising out of the claimed fraud of Walter and Arthur Eddy. Petition for writ of certiorari in that appeal is also pending in this court, No. 1050.

In 1934, bill (later amended) was filed to construe the will of Arthur D. Eddy (Vol. II, page ix). Answer in the nature of a cross-bill was filed (R. 56), and in 1936 an interlocutory order was made construing the will in part, and directing an accounting (R. 117-118). This accounting was made (R. 815), exceptions taken to it (R. 122), and prior to their hearing in August, 1938 (R. 220, 300), counter-claims by Mrs. Doebler's ancillary administrator, by Dean Lucking, as guardian (R. 82), and by Cynthia Mills Cleveland were filed (page 1, No. 8336), alleging fraud on the part of Walter and Arthur Eddy against their sister, Lila Eddy Doebler (page 9, No. 8336). A hearing was then had on these counter-claims (page 114, No. 8336), and a separate judgment rendered, from which an appeal was taken (No. 8336). Later the District Court disposed of the entire case, and entered judgment (R. 186). This judgment was affirmed by the Circuit Court of Appeals, Sixth Circuit.

Arthur D. Eddy, a resident of the city of Saginaw, Michigan, died April 22, 1925 (R. 16). At the time of his death substantially his entire estate consisted of all of the shares of stock of C. K. Eddy & Sons (R. 7), which was and is a Michigan corporation organized by Mr. Eddy's father, himself, his two brothers and his sister (R. 11). One-half of the shares of stock of C. K. Eddy & Sons had been retired by purchase. (Certificates No. 31, 35, page 147, case No. 8336). With his original stock, and stock obtained by inheritance through the death of his brothers and father, Mr. Eddy had 12,500 shares, and was the owner of all of the outstanding stock of the company (R. 26).

C. K. Eddy & Sons corporation had authority to engage, and was engaged, in a variety of businesses (895). It owned real estate and stocks and bonds of other companies, owned all of the stock of the Saginaw Milling Company (R. 28-38, incl.), except certain directors' qualifying shares, and the Saginaw Milling Company, in turn, owned stock in other corporations, particularly the stock of grain and mercantile companies engaged in a like business (R. 838, 841).

The 12,500 shares of stock in C. K. Eddy & Sons were inventoried in Mr. Eddy's estate as of the value of $3,600,000.00 (R. 26), which was a compromise between the amount arrived at by considering the earnings of the company and the valuation placed on each respective asset (R. 41). The court found as a fact that said stock was of the value of $3,600,000.00, on April 22, 1925 (R. 169).

The will of Mr. Eddy (R. 6-16, incl.) divided the stock substantially as follows: One-third outright to

his wife, Charlotte Eddy, now Charlotte Eddy Morgan, who was made a defendant in this case on motion of Mrs. Cleveland, the niece of Mr. Eddy. One-third of the stock was left to the Second National Bank & Trust Company of Saginaw, as trustee under the ninth paragraph of said will, and the other one-third of the stock to the Second National Bank & Trust Company of Saginaw, as trustee under the tenth paragraph of said will.

Under the ninth paragraph of the will (R. 8) the income was substantially all paid (excepting one hundred dollars a month to Frances Eddy, of Exeter, Maine), to Lila Eddy Doebler, sister of Mr. Eddy, and mother of Mrs. Cleveland, and upon her death (Laura S. Eddy having previously died) Frances Eddy was to receive ten thousand dollars from the trust estate, and the entire remaining trust estate, together with any income which might be on hand or which might have accrued, or would thereafter accrue, less all proper charges and expenses in connection therewith, should be divided by the trustee, one-half for Cynthia Mills Cleveland and the other one-half for the C. K. Eddy Family Memorial Fund Trust created and described in the tenth paragraph of the will.

The tenth paragraph (10) contains a clause as follows:

> "In case any losses in the principal of said trust estate are suffered during the pendency thereof, then I will and direct that such losses be made good out of the income from said trust estate before any further income is expended for the purposes stated" (R. 11).

This clause does not appear in the ninth paragraph of the will.

The will was admitted to probate in the Probate Court for the County of Saginaw, May 25, 1925, and the Second National Bank & Trust Company of Saginaw and Mr. George L. Humphrey, Mr. Eddy's confidential secretary and general manager of the company, were named as co-executors and later co-trustees. Mr. Humphrey died March 30, 1932, and under the terms of the will the bank continues to act as sole trustee (16-17).

In 1934, respondent Second National Bank & Trust Company of Saginaw, Michigan, as trustee, etc., filed this bill (R. 1) to construe Mr. Eddy's will, and particularly with reference to the clause directing the making good of losses, under the tenth paragraph thereof. Later an amended bill of complaint was filed (R. 16) asking for a ratification of certain transactions, and an answer in the nature of a cross-bill was filed by Cynthia Mills Cleveland (R. 56), the daughter of Mrs. Doebler and niece of Mr. Arthur Eddy, in which she claimed mismanagement on the part of the Second National Bank & Trust Company of Saginaw, as trustee, and asked that the trust company be surcharged by reason of certain losses in the administration of certain specific assets of C. K. Eddy & Sons.

The court made an interlocutory order (R. 117) construing the will in part, and directed that an accounting be filed by the bank, not only of the administration of the trust, but also of the administration of the corporation C. K. Eddy & Sons, of which it was trustee for two-thirds of the stock. This account was filed (R. 236, 815), allowed in evidence (R. 245), exceptions to it taken (R. 122) and overruled (R. 130).

Parties To the Litigation.

The parties to this litigation are as follows:

(a) The Second National Bank & Trust Company of Saginaw, Michigan, as trustee of a certain trust created by the ninth paragraph of the last will and testament of Arthur D. Eddy, deceased, and as trustee of a certain trust created by the tenth paragraph of said last will and testament, is the plaintiff and one of the respondents. It is represented by William C. O'Keefe and Frank A. Rockwith, of Saginaw, Michigan.

(b) The defendant, Lila Eddy Doebler, deceased (May 10, 1938), was the sister of Arthur D. Eddy, lived in Baltimore, Maryland, and was represented in this litigation by Mr. J. LeRoy Hopkins, of Baltimore, Maryland. Mr. Hopkins died just prior to the death of Mrs. Doebler. Howell Van Auken, one of the petitioners herein, claims to be her administrator in Michigan. She was entitled to the income during her life from a trust created by the ninth paragraph of the will of Arthur D. Eddy. Mr. Van Auken is represented by Mr. William Alfred Lucking and Lawrence M. Sprague, of Detroit, Michigan, and appears personally.

(c) The Mercantile Trust Company of Baltimore, Maryland, was trustee under Mrs. Doebler's will. Miller, Canfield, Paddock & Stone (Mr. Frederick S. Besimer) of Detroit, Michigan, represent the trustee.

(d) The petitioner Cynthia Mills Cleveland is the niece of Arthur D. Eddy, and daughter of Lila Eddy

Doebler, and is the remainderwoman as to an undivided one-half of the *corpus* of the trust created under the ninth paragraph of said last will and testament. She resides in California. Mrs. Cleveland is represented by Mr. William Alfred Lucking, Mr. Howell Van Auken and Mr. Lawrence M. Sprague, of Detroit, Michigan.

(e) C. K. Eddy & Sons is a corporation, organized by the Eddy family in 1893, and is represented by William C. O'Keefe and Frank A. Rockwith, of Saginaw, Michigan.

(f) Mr. R. Perry Shorts, president of the Second National Bank & Trust Company, Mrs. Charlotte Eddy Morgan, the widow of Arthur D. Eddy, Mr. George B. Morley, now deceased, and C. K. Eddy & Sons, a Michigan corporation, were made parties defendant by Cynthia Mills Cleveland (R. 797). Mr. Morley having died prior to March 4, 1936, his executors appear (R. 109). Mr. R. Perry Shorts and the executors of the estate of Mr. George B. Morley appear by William C. O'Keefe and Frank A. Rockwith, of Saginaw, Michigan. Mrs. Charlotte Eddy Morgan appears by Mr. George R. Effler, of Toledo, Ohio.

Will Of Arthur D. Eddy.

Paragraph "Ninth" reads as follows (R. 8):

> "NINTH: I will and direct that after the dividends referred to in Clause Seventh above have been paid as therein provided, that my executors shall have lawfully transferred to THE SECOND NATIONAL BANK OF SAGINAW, and GEOFGE L.

HUMPHREY, my trustees, hereinafter named, certificates representing one-third (1/3) of the issued and outstanding capital stock of said C. K. Eddy & Sons, I hereby giving and bequeathing to said trustees said amount of said stock, IN TRUST, however, for the following uses and purposes and subject to the powers and provisions hereinafter set forth; the trust estate hereby created to be continued during the lives of Laura S. Eddy of Los Angeles, California, and my sister, Lila Eddy Doebler, of Baltimore, Maryland, and to cease and determine upon the death of the survivor of said two named persons.

The income received from said trust estate shall be used and applied by the trustees as follows:

(a) To the payment of all necessary expenses properly chargeable to the maintenance and execution of said trust estate, including said trustees' reasonable fees for services in connection therewith.

(b) The payment of seven hundred fifty ($750) dollars on or about the first day of January, April, July and October of each year, to Laura S. Eddy of Los Angeles, California, if she survives me, and so long as she shall live, all as provided in a certain contract between her and me above described in clause fourth; and in addition to the above amounts required to be paid to her under the specific terms of said contract, I hereby direct my said trustees to pay to her, if she survives me, and so long as she shall live, an additional seven hundred fifty ($750) dollars on or about the first days of January, April, July and October of each year.

(c) The payment of one hundred ($100) dollars per month to my cousin, Frances Eddy of Exeter, Maine, if she survives me, such payments to continue during the full pendency of this trust estate, PROVIDED, however, that if she dies prior to the termination thereof, such payments shall cease upon her death.

(d) The payment of the entire balance of income received from said trust estate to my sister,

Lila Eddy Doebler, of Baltimore, Maryland, if she survives me, and so long as she shall live, such payments to be made to her quarter-annually if possible. Should my said sister die before I do or during the pendency of this trust estate, the payments which would otherwise have been payable to her had she lived, shall be paid to her daughter, my niece, Cynthia Mills Cleveland of Worcester, Massachusetts, if she survives me and so long as she shall live while this trust estate is still effective. Should my said niece die before I do or during the pendency of this trust estate, then the payments which would otherwise have been payable to her had she lived, shall be paid to the issue of her body and share and share alike if more than one issue, until the date on which this trust estate shall cease and determine; but if my said niece, and all issue of her body shall die prior to the termination of this trust estate, then the payments which would otherwise have been payable to her or her issue, shall be added and accumulated to the principal of said trust estate until the termination date thereof, as herein provided.

(e) I will and direct that upon the termination of this trust estate upon the death of the survivor of said Laura S. Eddy and Lila Eddy Doebler, and before disposing of the assets thereof as hereinafter provided, my trustees shall first pay to my said cousin, Frances Eddy, of Exeter, Maine, the sum of ten thousand ($10,000) dollars, if she is then living; and the entire remaining trust estate, together with any income which may be on hand and undistributed or which may have accrued or shall thereafter accrue, *less all proper* charges and expenses in connection therewith shall be, as soon as reasonably possible and without detriment to the interests thereof, divided by the trustees into two parts, as nearly equal as possible, and paid over, transferred and delivered, share and share alike, as follows:

One of said two equal parts of said trust estate

to my said niece, Cynthia Mills Cleveland, if surviving, or if not surviving then in equal parts to any and all issue of her body then surviving. If at the time of the termination of this trust estate my said niece and all issue of her body shall have previously died, then the entire part of said trust estate which would have gone to her, or them, shall be paid over and delivered by my said trustees unto the C. K. Eddy Family Memorial Fund Trust created and described in clause tenth of this instrument.

The other of said two equal parts of said trust estate to the C. K. Eddy Family Memorial Fund Trust created and described in clause tenth of this instrument" (R. 10).

The tenth paragraph (R. 10) leaves the remaining one-third of the capital stock of C. K. Eddy & Sons to the Second National Bank and George L. Humphrey (now deceased) in trust, to create and maintain the C. K. Eddy Family Memorial Fund, and contains the following direction:

* * * "In case any losses in the principal of said trust estate are suffered during the pendency thereof, then I will and direct that such losses be made good out of the income from said trust estate before any further income is expended for the purposes stated" * * * (R. 11).

The twelfth paragraph of his will provides (R. 15):

* * *"It is my desire, however, that the trustees shall continue the trust estates herein created in the form they are in at the time they receive same, unless and until circumstances arise which, in their judgment, make it financially advantageous to the interests of said trust estate to discontinue C. K. Eddy & Sons as a corporation, due consideration in such action to be given to the interest of my wife in said corporation."

The will gives the trustee broad powers. Paragraph "Twelfth" reads as follows (R. 15):

> * * * "I will and direct that my said trustees shall have the same control over the assets of any and all of my property, real, personal or mixed, delivered to it in trust as herein provided, that I would have, if living; to hold, manage, control, care for, collect, sell, assign, transfer, substitute, convert from one form of investment into another, as and when it deems advisable and for the best interests of said trust property. It is my desire, however, that the trustees shall continue the trust estates herein created in the form they are in at the time they receive same, unless and until circumstances arise which, in their judgment, make it financially advantageous to the interests of said trust estate to discontinue C. K. Eddy & Son as a corporation, due consideration in such action to be given to the interest of my wife in said corporation. My trustees, however, shall have the power and authority to sell or otherwise dispose of the whole or any part of said trust property and invest or reinvest the proceeds in such income bearing securities as they may deem advisable and for the best interests of said trust property and without being restricted to such investments as may be legal investments for trustees under the law of the state of Michigan" * * *.

The Proofs.

The case came on for final hearing August 30, 1938 (R. 220). Certain exceptions had been taken to the accounts filed in 1936, and these exceptions were brought on for hearing. They had not been presented because of the sickness and death of Mr. J. LeRoy Hopkins, who

represented Lila Eddy Doebler, and then, although they had been set for May 17, 1938, on May 10, 1938, Lila Eddy Doebler herself died (R. 221).

The District Court made an order (R. 228-229) making Howell Van Auken, as administrator, party defendant, and revived and continued the cause as against him, and allowed him to file his cross-bill, and made an order (R. 798) that the Mercantile Trust Company of Baltimore, Maryland, as trustee under deed of trust dated December 24, 1925, made by Lila Eddy Doebler, now deceased, to said trust company, as trustee aforesaid, be granted right of intervention.

Plaintiff then took the proof of William R. Walton, Jr., the auditor who had prepared the accounts (R. 235), and he was cross-examined by counsel for counter-claimants (R. 245, 284). Objection was made to the accounts, among other reasons because of the failure to use the appraised values as of Arthur Eddy's death instead of the cost values, as were used (R. 264-265).

Petitioner's counsel (R. 265) asked for certain statements (R. 267), and upon the conclusion of the cross-examination (R. 293) respondent rested (R. 294) on the accounting. The case was then adjourned to permit the trial of the issue raised at that time with regard to the claim of fraud of Walter and Arthur Eddy, and during the interval Mr. Walton prepared Exhibits 9, 10, 11 and 12, to answer petitioners counsel's criticism, and testified (R. 310) that using the theory of petitioners' counsel, the assets of C. K. Eddy & Sons on June 1, 1938, based on the appraisal of Mr. Peter and Mr. Glynn were worth roughly $3,977,000.00 (R. 311). Exhibits 9, 10, 11 and 12 were introduced in evidence (R. 311, 312,

313, 314), and all of the accounts filed by the plaintiff, and which constitute its case, are found in Volume II, Exhibits (R. 815, 894, 916). These accounts take every asset of C. K. Eddy & Sons as of the time of the death of Mr. Eddy in April, 1925, trace its history, show what was done with it, if sold or disposed of and what was done with the proceeds of the sale.

After the allowance of all of the accounts of the respondent, testimony was taken regarding the liquidation of the Saginaw Milling Company (R. 312, 912), with reference to the loss of Guardian Detroit Union Group, Inc., stock, Dr. Ralph E. Badger testifying at some length (R. 417, 484), and with reference to the Second National Bank & Trust Company purchase by the president of the bank and respondent R. Perry Shorts (R. 603, 730, incl.).

At the conclusion of the case the court requested a statement of petitioners' counsel as to what he claimed, and that statement is found beginning on page 747 and continuing to page 784 of the record.

Thereafter the District Court made an oral finding of fact, and later entered a final judgment which (R. 186-188, incl.):

> (1) Vacated that portion of the interlocutory order of date April 11, 1936, which disregarded the corporate entity of C. K. Eddy & Sons, allowed the accounts filed therein in evidence, having found that the corporation was free from fraud and not being used as a sham.
>
> (2) Approved the acts of the trustees and of the officers, agents and directors of C. K. Eddy & Sons.

(3) Allowed the accounts of the plaintiff.

(4) Dismissed the cross-bills and counterclaims filed against R. Perry Shorts, George B. Morley and his executors, C. K. Eddy & Sons, Charlotte Eddy Morgan and the plaintiff by Cynthia Mills Cleveland.

(5, 6, 7) Dismissed the cross-bills and counterclaims alleging fraud on the part of Walter S. and Arthur D. Eddy in 1908 and 1920.

(8) Charged the expenses of the trustee against the portion of the trust held for Cynthia Mills Cleveland, except one thousand dollars, which was charged to the C. K. Eddy Family Memorial Fund Trust.

(9) Found that the trustee had paid all of the dividends or income to which Lila Eddy Doebler was entitled during her lifetime to the Mercantile Trust Company of Baltimore, Maryland.

The judgment of the District Court was affirmed by the Circuit Court of Appeals, Sixth Circuit (Hicks, Allen and Martin, circuit judges), the court being of the opinion that the findings of fact of the District Court were supported by substantial evidence and that no reversible error was committed.

ARGUMENT.

The District Court found as a fact that "the accounts and reports of the management and operation of said trusts filed in this court are correct and that the acts and doings of the trustee, its officers and agents, and the officers, agents and directors of C. K. Eddy & Sons, in the operation and management of said trusts and of the corporation C. K. Eddy & Sons, from April 22, 1925, to the present date, should be and hereby are ratified and approved."

The District Court further found "that the trustee has kept intact the corpus of the estate and there has been no waste thereof, and that it has used an honest, careful discretion within the limits of the will of Arthur D. Eddy, deceased."

The United States Circuit Court of Appeals, Sixth Circuit, was of the opinion that these findings were supported by substantial evidence.

> "The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. We accordingly accept them as the conclusive basis for decision. *Texas & N. O. R. Company v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548, 558." Virginian Ry. Company v. System Federation No. 40 et al., 300 U. S. 515.*

Rule 52, Findings by the Court, Rules of Civil Procedure for the District Courts of the United States:

> "(a) Effect. * * * Findings of fact shall not

be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Warren v. Keep, 155 U. S. 265.

(a) C. K. Eddy & Sons, a Michigan corporation, is to be considered a distinct legal entity, created by authority of the statutes of Michigan, and is to be conducted pursuant to the laws of Michigan, with the powers and subject to the restraints placed on such a corporation, and the trustee is the trustee of the shares of stock of C. K. Eddy & Sons.

In 1936, the District Court, in his interlocutory order (R. 117), considered the claim of petitioners' counsel, that there was fraud in the corporation C. K. Eddy & Sons and that its assets had been impaired and that therefore the stock held by the trustee was not worth what it had been because of this fraud, mismanagement and improper handling of the corporation.

All of the counsel in the case were given opportunity (R. 118) to examine all of the books, records and memorandum in the office of C. K. Eddy & Sons, or in the Second National Bank & Trust Company, trustee, and the bank was directed to file an accounting not only of its doings under the trust, but also of the operation of C. K. Eddy & Sons, the corporation (R. 118). This accounting was made in 1936 (R. 236, 815), supplemental accounts were filed (R. 236, 866, 879), bringing the account up to June 30, 1938 (R. 879), the objections of petitioners' counsel were considered (R. 284), and accounts filed in accordance with his theories (R. 310-313). The court finally allowed all of the accounts, and held that

there was no fraud or mismanagement in the affairs of the corporation (R. 184, 186), and vacated that portion of the interlocutory order disregarding the corporate entity of C. K. Eddy & Sons (R. 186).

The District Court was correct in first looking through the corporate entity and, having determined that there was no fraud, vacating that portion of the interlocutory order disregarding the legal entity, and holding that the corporation should thereafter be regarded as a distinct separate legal entity, with the authority granted by the statutes of Michigan.

In *Majestic Company v. Orpheum Circuit, Inc. (C. C. A. 8th Cir.), 21 Fed. Rep. 2nd) 720 at 724,* the court said:

> "(4) The corporation will be regarded as a legal entity as a general rule, and the courts acting cautiously and only when the circumstances justify it, will ignore the fiction of corporate entity, where it is used as a blind or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud, and will regard the corporation as an association of persons."

The court cites: *New York Trust Company v. Carpenter (C. C. A. 6th Cir.), 250 Fed. 668; Donnell v. Herring-Hall-Marvin Safe Company, 208 U. S. 267, 273,* together with many other cases, including notes in the *Harvard Law Review* and the *Columbia Law Review.* The case is followed in *Boatright v. Steinite Corp., 46 Fed. (2nd) 385 at 388.*

In *Pittsburgh & Buffalo Company v. Duncan (C. C. A. 6th Cir.), 232 Fed. 584 at 587 (146 C. C. A. 542),* Judge Knappen, writing the opinion, said:

> "(1, 2) As respects stock ownership and corporate control: The mere fact that the stockholders in two

or more corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, * * * (citing cases). True, the legal fiction of distinct corporate existence will be disregarded when necessary to prevent fraud or when a corporation is so organized and controlled and its affairs so conducted 'as to make it only an adjunct or instrumentality of another corporation'" * * * (citing cases).

In *Martin v. Development Company of America (C. C. A. 9th Cir.), 240 Fed. 42 at 45 (153 C. C. A. 78),* the court said:

"(1) * * * A holding corporation has a separate corporate existence, and is to be treated as a separate entity, unless facts are averred which show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth, or where the organization and control are shown to be such as that it is but an instrumentality or adjunct of another corporation. *Pittsburgh & Buffalo Company v. Duncan et al., 232 Fed. 584, 146 C. C. A. 542; In re Watertown Paper Company, 169 Fed. 252, 94 C. C. A. 528.*"

This rule is followed in Michigan.

Finley v. Union Joint Stock Land Bank of Detroit, 281 Mich. 214.

Arthur Eddy, in his lifetime, owned all of the stock in C. K. Eddy & Sons, except shares to qualify directors. In his will he said (R. 15):

"* * * It is my desire, however, that the trustees

> shall continue the trust estates herein created in the form they are in at the time they receive same, unless and until circumstances arise which, in their judgment, make it financially advantageous to the interests of said trust estate to discontinue C. K. Eddy & Sons as a corporation, due consideration in such action to be given to the interest of my wife in said corporation."

The trustee, therefore, was holding one-third of the stock of C. K. Eddy & Sons under the ninth paragraph of the will, and another one-third under the tenth paragraph of the will. Mrs. Charlotte Eddy Morgan was holding her one-third separate and apart from the trustee, in fee,—her own stock to do with as she saw fit (R. 8). The trustee, therefore, is not holding assets in its hands, but is holding simply shares of stock in C. K. Eddy & Sons (R. 8, 10), which was a corporation owned and controlled in his lifetime by Arthur D. Eddy. He directs the continuance of the corporation in his will (R. 15).

A similar situation is found in *Boyle et al. v. John Boyle & Company, 120 New York Supplement 1048, affirmed in 94 N. E. 1092,* the syllabus reading:

> "Testator gave residue of his estate to trustees, in trust, directed the creation of a corporation of his business, empowered the executors and trustees to sell real estate and mineral estate and to invest the proceeds of the mineral lands unconverted and the personal estate in stocks and bonds of a corporation formed, and provided that the stock of the corporation should be voted by the executors and trustees, as directed by persons named acting as directors. The corporation was formed and a large part of the residuary estate was delivered to it by the executors, who received the entire stock of the corporation in ex-

change and the executors and trustees hold such stock.

Held, that the corporate stock constituted the trust property, title to which was in the trustees, and the trustees did not have title as such to the property transferred to the corporation which must be managed according to law, the directors thereof having the right to manage it.

Where a testator directed the creation of a corporation to which a part of his estate should be transferred, he meant the creation of a legal entity as the statute directs, to be conducted pursuant thereto, with the powers, and subject to the restraints placed thereon thereby."

In the above cause, the testator directed the formation of the corporation in his will. In the case at bar the corporation was organized during the lifetime of the testator, and the will contained an express provision to continue it.

"Reading the will in the light of testator's surrounding circumstances *(Hall v. Stephens, 65 Mo. 670, 677, 27 Am. Rep. 302; Plummer v. Roberts, 315 Mo. 627, 654, 287 S. W. 316)*, and considering all of its terms, we entertain no doubt that its proper construction is that the corporation should take absolute title to the property conveyed to it by the trustees, and that testator's children and grandchildren should receive under his will stock in the corporation, and not interests in the property itself and that they have no interests in the property except as stockholders of the corporation." *Niedringhaus v. William F. Niedringhaus Inv. Company, 46 Southwestern Reporter (2nd), 828 at 842. (Missouri.)*

See *In re Sulzer's Estate, 185 Atlantic 793 (323 Pa. 1).*

"Where there is express language in a will indicating the construction the testator desires to put on

a clause creating a trust, such construction must prevail." *69 Corpus Juris "Wills," Paragraph 1855, page 752,* citing *Lewis v. Citizens National Bank, 23 S. W. 667, 95 Ky. 79.*

(b) C. K. Eddy & Sons, its board of directors and officers, did not fail in their duties to its stockholders, and particularly as to:

(1) Retention of Guardian Detroit Union Group, Inc., stock.

(2) Dissolution of the Saginaw Milling Company.

(3) Retention of Consolidated Coal Company stock.

(4) Reorganization of the Second National Bank.

(5) Failure to sell certain stocks at highest price reached.

The corporation C. K. Eddy & Sons, organized under the laws of Michigan in 1893, was the owner of all of the stocks, bonds, real estate and accounts discussed in this case, excepting its own shares of stock held by the bank and by Mrs. Morgan, i. e., the shares of stock in the corporation C. K. Eddy & Sons itself.

The corporation has as directors (590 *et seq.)* (R. 606) (page 168 case No. 8336) Mr. Shorts, Mr. Tessin and Mrs. Morgan. While Mr. George B. Morley was living he was a director, and Mr. Tessin succeeded him. The Second National Bank & Trust Company, as trustee, did not hold the assets of C. K. Eddy & Sons in trust, such as the stock of the Milling Company or the stock

of the Guardian Detroit Union Group, Inc. The bank, as trustee, held nothing but the shares of stock of the corporation C. K. Eddy & Sons (R. 8, 10).

What is the duty of the Board of Directors and officers of C. K. Eddy & Sons to its stockholders, the Second National Bank & Trust Company as trustee, and Mrs. Charlotte Eddy Morgan?

> "* * * The general rule as to the measure of care, skill and diligence required of the directors of a corporation may be said to be such as prudent men exercise in the conduct of their own affairs, and this must be determined in each case in view of the circumstances. The rule as otherwise expressed is that directors must answer for ordinary neglect; and 'ordinary neglect' is understood to be the omission of that care which every man of common prudence takes of his own concerns." *2 Thompson on Corporations, 3d Ed., paragraph 1376,* and cases cited.

> "A director occupies a fiduciary relation to the corporation and the stockholders. His position is one of trust and he is frequently denominated a trustee and held accountable in equity as such, although he is not a trustee in a technical or unlimited or universal sense. * * * He is bound to act with fidelity, the utmost good faith, and with his private and personal interests subordinated to his trust duty whenever the two come in conflict." *14 A Corpus Juris, paragraph 1866, pages 97, 98, 99.*

> "Good faith is a defense, where a trustee, acting within the limits of his powers with proper prudence and diligence, commits mere mistakes or errors of judgment, but is not a defense where a trustee disregards the limits placed upon his power by law or by the trust instrument." *MacKenzie v. Union Guardian Trust Company, 262 Mich. 563 at 588.*

> "Honesty, good faith and reasonable diligence, within the limits of a trustee's authority, are adequate protection to such trustee." *Kelsey v. Detroit Trust Company, 265 Mich. 358.*

Before considering the particular transactions of which complaint is made, let us consider the situation of C. K. Eddy & Sons Corporation, particularly with reference to the conduct of its business.

Arthur Eddy died in 1925, and at that time C. K. Eddy & Sons, the corporation, was appraised by Mr. James B. Peter and Mr. Edward W. Glynn, and their letter (40) with regard to the appraisal states that they placed a valuation of $3,600,000 on the 12,500 shares of stock of C. K. Eddy & Sons. Further, they took a physical inventory of all of the assets of C. K. Eddy & Sons, and stated that the aggregate amounted to $4,211,557.35. They decided, however, that the earnings of the company did not justify this appraisal. They capitalized the earnings on a six per cent basis, and figured the assets worth approximately $2,900,000, and then came to the conclusion that a fair valuation was $3,600,000. The trial court adopted this valuation as the valuation of C. K. Eddy & Sons at the time of the death of Mr. Arthur Eddy (R. 169).

There were paid out as administration expenses in accordance with the directions of Mr. Eddy's will, from the corpus of the estate, some $502,000 (R. 244), and in dividends approximately $1,200,000 (R. 244).

On June 30, 1938, using the accountant's figures based on the appraised value of $4,200,000, as suggested by appellants' counsel, the assets of C. K. Eddy & Sons

were worth, roughly, $3,977,000 (R. 311). From the original appraisal of $4,200,000, the $502,000 is to be deducted, as it is part of the administration expense to be taken from the corpus in accordance with Mr. Eddy's will. Therefore, in 1925, the assets of C. K. Eddy & Sons, after deducting the expense of his death and the taxes, were approximately $3,700,000. In 1938, the directors had left, after paying $1,200,000 in dividends, $3,977,000 (R. 311).

The trial court was justified in saying:

> "It goes through this case that the Board of Directors of the Eddy Corporation were using unusual care, attention, energy, attending to business. They were directors of a business corporation and acting as reasonably prudent business men should have acted, and they were acting within the limits of the will of Mr. Eddy, and conducting the affairs of C. K. Eddy & Sons, the corporation, as ordinary business men would have conducted it. They were not trustees, limited to a trustee's investments. They were business men and in the exercise of due care as business men" (R. 178).

> "Taking that corporation as a whole, I wish we could have trustees with conduct as good as that corporation; their investments, their sales, the prices they obtained, the care with which they kept track of the prices, the thorough manner in which they investigated through agencies that the whole world relies on, men whom the whole world relies on. I say it is an unusual situation, and if coming into this court the contest was who had done the best job during these hard times, they would be a contestant for the first prize. I say here is a marvelous job done by the Eddy Corporation" (R. 176).

The Eddy Corporation had losses, but it also had profits. Appellants' counsel is under the impression that

he may take advantage of the profits and that the Second National Bank & Trust Company, as trustee, should pay the losses (R. 748, 758). This, of course, is not the law. The directors of the Eddy Corporation are not liable for errors of business judgment, unless made in bad faith *(65 Corpus Juris, Sec. 701)*, and if the appellants' counsel is to take advantage of the good judgment of the directors, he must also bear with their business mistakes, if any.

The officers and agents of C. K. Eddy & Sons carefully supervised the investments. The cards are found, beginning at page R. 511. Miss Durham's testimony as to manner of supervision is found at page R. 484, and the minutes of the corporation for some years were read in part into the record, and at page R. 568, during the reading of the minutes by appellants' counsel, the court said:

> "The Court: I think the main point of that is to show the extent of attention and care they were giving to it.
>
> Those you are omitting, if they had any value at all, it is simply this, to indicate some companies just went on and paid no attention that they have got stock in. They just take it and like it or dislike it, but don't do anything about it, but they do seem to be giving careful consideration not only to their own business but to the business of the concerns in which they have holdings. Isn't that a fair—
>
> Mr. Lucking: I will say that their minutes appear to be full and—
>
> The Court: More so than—I read a great many minutes, and I help keep some, but these seem to me to be very complete and helpful. I get a pretty good picture of things as you go along there. I think we can say that it is unusual for a company to keep such complete minutes about the business or concerns in which they have investments."

The trial court discussed the situation in regard to the Guardian stock. His findings are set forth at page R. 177, and on page R. 182 he specifically finds:

(1):

"Complaint is made about the failure to sell Guardian Detroit Union Group, Inc., stock. This stock was not held by the Second National Bank & Trust Company of Saginaw, as trustee. It was held by the corporation C. K. Eddy & Sons. The directors of C. K. Eddy & Sons properly supervised the investment, used due care and diligence in the holding of the stock, and acted as ordinarily prudent and careful men did in the same situation. The evidence is undisputed that it was a suitable investment at the time."

(2) Dissolution Of the Saginaw Milling Company:

C. K. Eddy & Sons owned all of the stock of the Saginaw Milling Company. Mr. George L. Humphrey, Mr. Eddy's confidential secretary, was president of the Saginaw Milling Company. A complete history of the Saginaw Milling Company is found on page R. 836, Memorandum No. 2.

During Mr. Eddy's lifetime, from 1918 to 1925, there had been substantial losses in the corporation, and in 1922 $300,000 worth of the common capital stock was charged off. C. K. Eddy & Sons, in 1931, voted to liquidate the business, and this liquidation has been substantially accomplished.

In response to appellants' counsel's request, Exhibit 11 (R. 912) was prepared. This exhibit relates to the

Saginaw Milling Company account, and sets forth the investment in the Saginaw Milling Company as of April 22, 1925, and the effect of subsequent changes to June 30, 1938. The trial court made the following finding of fact on the Saginaw Milling Company (R. 182):

> "With respect to the Milling Company, all the stock of which was held by C. K. Eddy & Sons, and of which Mr. Humphrey (Mr. Eddy's confidential secretary and co-executor) was president, the same may be said. Due care was used, and the company liquidated in a careful, able and conscientious manner. There is no justifiable complaint about that."

(3) Retention Of the Consolidated Coal Company Stock:

The Consolidated Coal Company was organized in 1906. The Eddys had turned over some of their stock in a mine for stock in the Consolidated Coal Company. Walter Eddy was a director and officer of the company; Arthur Eddy, a director and vice-president; George L. Humphrey, director, secretary and treasurer. The office is in the Eddy Building, on the sixth floor, and C. K. Eddy & Sons' office is on the fifth floor. A complete statement of the affairs of the Consolidated Coal Company is found in the memorandum attached to Exhibit 3, Memorandum No. 5, page R. 847. The company mines coal. During the years 1921 and 1923 tremendous profits were made. The company has not made money recently. There was no market for Consolidated Coal Company stock (R. 502).

C. K. Eddy & Sons received over $400,000 more in profit than was put into the Consolidated Coal Company in capital (R. 506, 566).

C. K. Eddy & Sons still has the stock in the Consolidated Coal Company, has made over $400,000 over and above the investment, and may make some more. The claim of appellants' counsel with regard to it, at the conclusion of the case, is found beginning on page R. 761.

(4) With Regard To the Reorganization Of the Second National Bank, the Court Said (R. 182-183):

> "There need be no complaint about the purchase of Second National Bank & Trust Company shares of stock in 1933. The investment was amply secured and returned a large profit."

This transaction resulted in the purchase back from the receiver of the Guardian Detroit Union Group, Inc., of all of the stock of the Second National Bank (R. 649-670 incl.). After charging off two million dollars of so-called doubtful assets, there still remained unimpaired capital stock of the bank of approximately $750,000 (R. 658, 856). This stock was purchased for $400,000 (R. 654). The Eddy Company put up $242,862.84, toward the purchase price (R. 668) and sold 53 per cent of the stock at $88.314 per share within five months (R. 668, 701). They retained approximately 45 per cent of the stock, and in 1938 it was worth $250.00 per share (R. 658). The entire transaction is set forth on page R. 856, and in the testimony of Mr. R. P. Shorts (R. 649 to R. 670 incl.), and the statement of the bank, December 31, 1938, Exhibit 203 (R. 657). Exhibit 204 (R. 699-701 incl.) covers the entire transaction. Even petitioners' counsel was forced to say (R. 781):

> "I am not asking damages because I can't figure it. I don't see where there is any damage."

Of course petitioners' counsel is again confused in thinking that the trustee bought this stock or conducted

the negotiations. The corporation C. K. Eddy & Sons, a separate, distinct legal entity, with Mr. Arthur Eddy's widow a member of the board of directors, purchased this stock, and made a handsome profit on it.

(5) Petitioners Complain Over Failure To Sell Certain Stocks At Highest Price Reached.

Petitioners complain (R. 59) that C. K. Eddy & Sons should have sold, during 1925 and 1929, certain stocks found on page R. 81. These stocks include railroad stocks in the important railroad systems of the United States, and in the Standard Oil Company of California. We will take, as an example, the Standard Oil Company of California: The record of Standard Oil Company of California is found on page R. 834 i, Schedule 3, page R. 6. 3,150 shares were on hand at the death of Arthur Eddy. More was purchased or acquired by stock dividend, and 200 shares were sold in 1935. It cost $89,666.67; it was appraised in 1925 at $186,834.38. Its retention was recommended by banks. It has been paying a dividend of $1.00 a year and never missed a year (R. 491). The stock left amounts to 3,441 shares. It was selling at 31 3/8 on September 22, 1939. This would give it a value of approximately $107,000. It cost $89,666.67. Why it should have been sold we are unable to determine, and what investment could have been made with the money received that is any better than Standard Oil of California, we are unable to state.

With respect to the railway stocks and the complaint made about them, we need only list those stocks:

Union Pacific,
Southern Pacific,
Northern Pacific,
Canadian Pacific,

the greatest railroads in the world.

The claims of petitioners' counsel are then followed for many pages (R. 747-784), but when all is summarized his claim is that the trustee is liable for one-sixth of the fair value of the assets of C. K. Eddy & Sons on April 22, 1925, the date of Mr. Arthur Eddy's death, and that in the event the assets are not valued at that figure, but some lower figure, the trustee must make up the difference (R. 784).

This misconception on the part of petitioners' counsel persisted in the case up to the moment of decision (R. 784).

Of course it is elementary that a trustee is not a guarantor of the values of the assets which he holds in his hands. *It is axiomatic that an executor or trustee is not an insurer, nor guarantor, and that the law goes no further than to place upon him the duty to use that degree of prudence and vigilance which would in general be exercised by a reasonably prudent man in the conduct of his own affairs.*

> *Vol. 3, Bogert on Trusts, Paragraph 612; No. 13;*
> *Matter of Clark's Will, 257 N. Y. 132, 177 N. E. 397, 77 A. L. R. 499;*
> *Brown v. Cleveland Trust Company, 233 N. Y. 399, 135 N. E. 829;*
> *In re Gouldey's Estate, 201 Penn. St. 491, 51 Atl. 315;*
> *In re Cuddeback's Estate, 6 N. Y. S. (2nd) 493 at 495.*

The accounts prepared by the auditor show that C. K. Eddy & Sons, the corporation, was worth more on June 30, 1938, than it was at the death of Arthur Eddy, after

deducting the expenses of administration and taxes. The trustee did not own the stocks complained of. These stocks were owned by the corporation C. K. Eddy & Sons, one-third of whose stock was owned by Mrs. Charlotte Eddy Morgan, Mr. Eddy's widow.

Counsel is in error when he continually, throughout his complaints, states that the trustee did not sell the stock, that the stock was not a proper trust investment. Mr. Eddy did not intend it to be. He gave express directions in his will to continue the corporation C. K. Eddy & Sons, and to continue the trust estate therein created in the form it was in at the time they received them (15). This the trustee did. The bank, as trustee, held the identical shares of stock of the corporation C. K. Eddy & Sons given it by Mr. Eddy's will, but it did not hold as trustee any of the assets of C. K. Eddy & Sons, or any of the stocks complained about by appellants' counsel. These stocks were held by the corporation C. K. Eddy & Sons, and that is as Mr. Eddy intended it.

Neither the trustee nor the directors and officers of C. K. Eddy & Sons were guarantors of values. They had the same assets, or substitutes therefor, in 1938 that they had in 1925, and although men had placed a lower value on those assets in 1932 than they did in 1938, or in 1925, they were still the same assets (R. 243, 244). The assets behind the shares of stock had been maintained (R. 311, 896). The court so found and directed the corporation to continue as Mr. Arthur D. Eddy wished it to continue. There had been no fraud, no mismanagement, no maladministration. The assets had been preserved unimpaired, enhanced in value, and dividends paid amounting to $1,200,000.

(c) The District Court did not abuse his discretion in directing payment of the trustee's expenses arising out of the litigation from the share of the trust estate held for Cynthia Mills Cleveland.

From an examination of the record it will be seen that this case commenced in 1934. In 1936 petitioners took the position that the trustee must account for the value of the assets as of the time of the death of Mr. Eddy, instead of being accountable for the assets themselves. For two years petitioners had every opportunity to examine the books, and in fact did so examine the books, subpoenaed the records of the corporation and of the bank into court on every hearing, and carefully examined every transaction in the hope of finding something wrong. The district court found nothing wrong, and was of the opinion that the expense of the litigation had been caused by Mrs. Cleveland's part in the lawsuit (183), which in fact it was. He therefore charged the trustee's expenses, excepting $1,000, to Mrs. Cleveland's share of the trust estate (R. 187). This was a proper exercise of his discretion.

In *Sprague v. Ticonic Nat. Bank et al., 307 U. S. 161,* Mr. Justice Frankfurther discussed what is technically known as costs between solicitor and client, and held that a District Court had authority to allow such costs, saying:

> "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, 1 Stat. 73, constituted that body of

remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress, e. g. *Michaelson v. United States, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451.* The sources bearing on eighteenth century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs 'between party and party,' but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs 'as between solicitor and client.'" * * *

"Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation."

The District Court had jurisdiction to charge the expenses of the trustee to Mrs. Cleveland's share of the trust estate. He listened patiently for some five years to the attempts of petitioners to find something wrong with this trust fund held in part for the benefit of a charity fund, and upon the failure to convince him that there was any maladministration, negligence or wrongdoing, and after affording every opportunity to appellants to examine the books and records in advance of the trial, and determine for themselves whether or not the trust had been properly handled, and allowing them to make many unnecessary parties defendants therein, he charged the expenses of the trustee against the party who caused them,—Mrs. Cynthia Mills Cleveland. In equity and justice he did the right thing.

CONCLUSION.

It appears from the record that the District Court was correct in finding that C. K. Eddy & Sons, a Michigan corporation, was to be considered a distinct legal entity and that the Second National Bank & Trust Company was trustee of the shares of stock of that corporation; that C. K. Eddy & Sons, its board of directors and officers, did not fail in their duties to its stockholders, and that the District Court had the jurisdiction, and was justified in directing payment of the trustee's expenses arising out of the litigation from the share of the trust estate held for Cynthia Mills Cleveland.

The case presents questions of fact which were decided adversely to the petitioners by the District Court, which finding was sustained by the Circuit Court of Appeals, Sixth Circuit.

The record in this case not only fails to disclose anything erroneous in the decision of the District Court, it affirmatively shows that there was no evidence upon which there could have been based any other decision than is found in the judgment rendered.

The petition for Writ of Certiorari should be denied.

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